

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

6
7 SEARS HOLDINGS CORPORATION,

8
9 Debtor.

10 - - - - - x

11
12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15
16 September 18, 2019

17 10:25 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24
25 ECRO: NAROTAM RAI

1 HEARING Re: Notice of Agenda of Matters Scheduled for
2 Hearing on September 18, 2019 at 10:00 a.m.

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4 Motion to Shorten Time for MOACs Motion (i) for a Stay
5 Pending Appeal; and (ii) to Expedite Transmittal of Record
6 on Appeal to district Court (related document(s)5110)

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8 Motion to Stay Pending Appeal and to Expedite Transmittal of
9 Record on Appeal to District Court

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25 Transcribed by: Sonya Ledanski Hyde

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24 BY: ALEXANDER J. BEEBY

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1 ALSO PRESENT TELEPHONICALLY:

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6 CHRIS STAUBLE

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1 P R O C E E D I N G S

2 THE COURT: Good morning.

3 MR. BEEBY: Good morning, Your Honor.

4 THE COURT: In re Sears Holdings Corporation. Let
5 me just -- I think everyone got the word on this, but the
6 confirmation hearing in Sears has been adjourned, and the
7 only matter on today's calendar is the motion by MOAC,
8 M-O-A-C, Mall Holdings LLC, for a stay pending appeal of my
9 September 5, 2019 order authorizing the assumption of
10 assignment of the MOAC mall lease to Transform.

11 So I've read the parties' pleadings in connection
12 with this matter. I'm happy to hear oral argument. So MOAC
13 have the burden, so you can go first.

14 MR. BEEBY: Thank you, Your Honor. My name is
15 Alex Beeby with Larkin Hoffman on behalf of MOAC Mall
16 Holdings. I'm here with Daniel Lowenthal of Patterson,
17 Belknap, Webb & Tyler. And I believe Tom Flynn may be
18 listening on the phone but not participating.

19 As a preliminary matter, there is also a related
20 motion to shorten time to have this expedited hearing, which
21 there's been no objections.

22 THE COURT: That's correct. I didn't see any
23 objection to that. The parties agree to the matter, so --

24 MR. CHESLEY: Richard Chesley on behalf of
25 Transform. No, Your Honor. No objection.

1 THE COURT: All right. So that motion is granted.

2 MR. BEEBY: With regard to the stay motion,
3 essentially MOAC is looking to reserve its right for
4 appellate review of some very important legal issues, which
5 -- for which there are no yet binding decisions.

6 The Mall -- MOAC is looking to protect Mall of
7 America and its tenants. And respecting your decision, Your
8 Honor, we believe that there is a strong argument on appeal.
9 The decision -- your decision is based on legal
10 interpretations that have not yet been reviewed by binding
11 courts and extending some of those legal interpretations to
12 new circumstances. Also note that there's no reason that a
13 tenant search cannot continue. There's been one underway
14 for several months now. And again, I want to reiterate that
15 there are some important legal issues here that do warrant
16 appellate review. And foreclosing review of those issues at
17 that time would not be in the public interest either.

18 THE COURT: Well, the irreparable harm here is not
19 based on a particular imminent transaction, right? Are we
20 aware of any proposed sublease of the -- of any material
21 portion of the space?

22 MR. BEEBY: No, Your Honor. And that would be
23 dealing with equitable mootness. Thea's both legal --

24 THE COURT: Well, what is the harm then?

25 MR. BEEBY: The harm is that if there is no stay,

1 the appeal itself would be rendered legally moot.

2 MR. CHESLEY: By?

3 THE COURT: By -- well, there's a case I refer the
4 Court to, a couple of cases. I mentioned the In re
5 (indiscernible) in the -- in the dispute.

6 THE COURT: But it would be rendered moot by the
7 subletting, right?

8 MR. BEEBY: No. I mean --

9 THE COURT: What else -- what else would render it
10 moot?

11 MR. BEEBY: By virtue of 363. So this lease was
12 assigned. The assignment is a product of the 363 sale, and
13 363(m) comes into play. Which in In re Gucci, which is a
14 Second Circuit case here, which is 105 F.3d 837. In that
15 case, a sale appeal was rendered legally moot by a one-day
16 --

17 THE COURT: But you're not -- you're not appealing
18 the whole sale.

19 MR. BEEBY: No, we're not.

20 THE COURT: You're appealing the assignment order.

21 MR. BEEBY: Correct.

22 THE COURT: So and if you were appealing the whole
23 sale, which is already closed, I understand your argument.
24 I would also require a bond equal to the sale consideration
25 price. But we're just talking here about the --

1 I really believe at this point, we're taking about
2 just one of the roughly 600 -- well, I guess a few stores
3 were -- oh, well, no. It was all leased. 600 leases that
4 we're talking about here. In that context, I can't imagine
5 363(m) as far as the sale is concerned applying here. Are
6 you going to rely on 363(m)? I mean, if you were, I would
7 think the sale would've closed already.

8 MR. CHESLEY: Correct, Your Honor.

9 THE COURT: So it -- so it would be moot already.

10 MR. CHESLEY: Correct, Your Honor.

11 THE COURT: So you're not relying on -- you
12 wouldn't -- you're not going to go to the district and say
13 363(m) applies here. This is over.

14 MR. CHESLEY: Well, we -- in effect, because we do
15 not have a transaction, I think we couldn't rely on 363(m)
16 for the purposes of arguing mootness because we have not
17 closed on a transaction to assume and assign this to a sub-
18 debtor.

19 THE COURT: The specific assign.

20 MR. CHESLEY: Correct, Your Honor.

21 THE COURT: Okay. All right. So I think the
22 focus really is on the sublease, and there you have the
23 procedure under 6.3, which is a lengthy procedure. It would
24 certainly give you plenty of time to seek to expedite an
25 appeal. But the record before me, which hasn't been

1 contested, is that it's going to take months to sublease
2 this premises.

3 In fact, I believe that two years was fairly tight
4 and required a condition, which is that the landlord not
5 interfere with the process. So I just -- it doesn't seem
6 like there's any -- no, obviously you want to generally have
7 appeals for -- promptly, and four district judges in this
8 courthouse are really quite good in ruling promptly on
9 appeals, but I don't see the urgency here.

10 MR. BEEBY: Well, Your Honor. Our argument is
11 based on looking at other cases in which there has been an
12 assignment of the lease that was rendered moot where -- and
13 they're across the country -- where there is no stay, that a
14 stay is required for assignment of a -- to protect the
15 appeal of an assignment of a lease.

16 THE COURT: Well, we just went through that.
17 They're not going to rely on 363(m) because this transaction
18 was done -- you don't need a further closing, right?

19 MR. BEEBY: No, Your Honor.

20 THE COURT: No. There's no further closing. This
21 is already done, so if you're really making that argument,
22 then it really is moot already because you should've
23 appealed the sale order. This is not -- this is a 365
24 order. It's an outgrowth of the sale. It's not a 363(m),
25 and they're not going to rely on 363(m), which Mr. Chesley's

1 just reiterated for the second time.

2 MR. BEEBY: And that's -- and I appreciate that.
3 My concern would be that a review in court would
4 independently --

5 THE COURT: Well, but if --

6 MR. BEEBY: -- look to the appeal as being moot.

7 THE COURT: They're -- they would be judicially
8 estopped because one of the four factors that -- and one of
9 the two, by far, most important factors for a stay pending
10 appeal is the likelihood of irreparable harm. So if I deny
11 your motion because there's no likelihood of irreparable
12 harm, then I can't see how they could then go --
13 notwithstanding the representation to me -- and go to the
14 district court and say that 363(m) applies because that's
15 the only irreparable harm you're saying exists is the
16 potential application of 363(m).

17 MR. BEEBY: That is correct, Your Honor.

18 THE COURT: Okay.

19 MR. BEEBY: That is the court -- and if they're --
20 we would seek leave to seek a new stay should the
21 circumstances come about in which an equitable mootness
22 argument would become right.

23 THE COURT: Okay. But it just, to me, that -- at
24 this point, you really haven't carried your burden on that
25 -- on that score, as I think you just acknowledged because

1 you're basically saying you would seek the right -- we would
2 reserve the right to seek a stay if that was going to
3 happen.

4 MR. BEEBY: That is -- that is absolutely --

5 THE COURT: But that's going to be a whole other
6 set of facts.

7 MR. BEEBY: Correct.

8 THE COURT: Because they're under the lease, you
9 know. 6.3, there's a whole procedure for notice about
10 pending transactions.

11 MR. BEEBY: Do you have any further questions,
12 Your Honor? I believe that actually addresses --

13 THE COURT: Okay.

14 MR. BEEBY: -- pretty much all of the issues
15 before the Court, unless there are other issues that --

16 THE COURT: Well, I mean, I -- just go -- for the
17 -- I mean, given that there is no real showing of
18 irreparable harm -- and, by the way, I do believe that,
19 generally speaking, risk of mootness standing alone doesn't
20 constitute irreparable injury, although there are times
21 when, again, the very fact of 363(m) might. But then, of
22 course, you -- then you have the bond requirement, which I
23 think if 363(m) were in fact to be relied on by both sides,
24 the bond here would be enormous, as it was in Adelphia.
25 That's the second part of Judge Scheindlin's opinion or set

1 of opinions in the case, which is the case you're relying on
2 for the mootness point.

3 But I also -- because of the lack of irreparable
4 harm, I don't believe a stay is in the public interest given
5 the need under the two-year deadline that my order proposes
6 for Transform to market the property and the cloud that the
7 stay would have over the marketing process.

8 And finally, on the -- on the issue of the merits,
9 obviously it's always a bit awkward for an appellant to
10 argue that there's a substantial showing (indiscernible) on
11 the merits when it's making that argument to the judge that
12 issued the order, which is what you have to do under Rule
13 8007.

14 But I've always been of the belief that not only
15 is no judge perfect but also that there are issues where it
16 truly is a close call, and I would like to think that I
17 would know that when rendering an opinion on the stay
18 pending appeal or request for a stay pending appeal.

19 And of course, under the majority and, I believe,
20 controlling standard in the second circuit, which may also
21 be the controlling standard set by the Supreme Court,
22 evaluating the merits factor in conjunction with the
23 irreparable harm factor is basically a balance. The more
24 irreparable harm, the less of a showing on the merits and
25 vice versa.

1 Here, I think you'd have to have a huge showing on
2 the merits because there's no irreparable harm. It would be
3 more than substantial. I think it would have to be quite
4 strong.

5 And while, at this point, we're dealing with
6 district court and bankruptcy court opinions, we're also
7 dealing with legislative history and a basic underlying
8 principle. First, it appears to me that Judge
9 (indiscernible) opinion and the multiple opinions on Toys
10 "R" Us are well reasoned and consistent with the statute
11 which has an introductory clause that refers to adequate
12 assurance performance under the lease, referring to the
13 lease.

14 And as importantly, perhaps more importantly,
15 although Congress in the bankruptcy code at times varies the
16 contractual expectations of the parties -- most obviously
17 since bankruptcy permits satisfaction of a default with tiny
18 bankruptcy dollars under certain circumstances -- generally
19 speaking, the parties' rights under the non-bankruptcy law
20 govern their rights vis-à-vis each other.

21 And it's extremely unusual, perhaps only -- I can
22 think of perhaps only one instance, and there the courts are
23 in disagreement, where Congress in the bankruptcy code gave
24 a non-debtor party greater rights than under their contract.
25 That one instance that I can think of is under section 1114

1 where Congress was under enormous pressure by the public in
2 light of the LTV case to prevent the termination of retiree
3 benefits.

4 And arguably, at least according to two out of
5 three judges of the Third Circuit, overrode provisions in
6 actual benefit agreements that permitted a debtor to
7 terminate those agreements and provided, at least for
8 permanent terminations, that the debtor could not do that
9 without going through the 1114 process. Other courts,
10 including myself, have said that even there, Congress
11 couldn't have meant that it would write out a provision
12 beneficial to a debtor in a -- in a contract that governed
13 the parties' pre-bankruptcy relationship.

14 Of course, in that context, there's a bit of a
15 hook because Congress could've been aware that a decision to
16 enforce an agreement that would deprive retirees of ongoing
17 benefits is a decision that's reviewable by the court. But
18 it appears to me truly inconceivable that where
19 sophisticated parties agreed to the terms of a lease,
20 particularly a lease that gave the parties a buyout
21 mechanism whereby a landlord -- namely MOAC -- could
22 preserve control, and 6.3 of this lease does, it would
23 confer on the landlord benefits that were not in the lease
24 itself.

25 Frankly, I don't -- I -- you know, bankruptcy has

1 been held to be consistent with the takings provision
2 because bankruptcy is also in the constitution. But to say
3 that that extra right could be added for a non-bankrupt
4 party might raise serious constitutional issues, i.e.
5 rewriting the parties' agreement for the benefit of the non-
6 debtor. In any event, I just don't see that Congress meant
7 to do that and the parties were bound by their arguments.

8 So, I don't think you've made the -- in this case
9 -- the necessary very strong showing, so really none of the
10 factors are met here. But the real -- the key inquiry is on
11 the irreparable harm, for what its' worth. So I'll deny
12 them option for a stay.

13 MR. BEEBY: Thank you, Your Honor.

14 MR. CHESLEY: Richard Chesley. We will submit an
15 order.

16 THE COURT: You don't have to formally settle
17 that, but you should run it by your counsel. And you should
18 refer to the hearing, including the representations made on
19 the record of the hearing.

20 MR. CHESLEY: That's what we'll do, Your Honor.
21 Thank you.

22 THE COURT: There's no issue about that.

23 MR. BEEBY: Thank you, Your Honor.

24 THE COURT: Okay. Thank you.

25 As far as the request for expedited treatment, I'm

1 not going to grant that because I don't see a need for
2 expedited treatment, and I don't like to give like friends
3 upstairs more work than they need to. If you think you need
4 to speed this up, you can -- you're free to make that
5 request of them as time goes by.

6 MR. CHESLEY: Thank you, Your Honor.

7 (Whereupon these proceedings were concluded at
8 10:45 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

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Landanski Hyde

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Date: September 20, 2019